EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(5)

PROCEEDINGS AND ORDERS DATE: 050186

CASE NBR 85-1-06004 ASY
SHORT TITLE Clark, Bret
VERSUS Florida

DOCKETED: Dec 9 1985

Date	Proceedings and Orders
Dec 9 1985	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
Jan 23 1986	DISTRIBUTED, February 21, 1986
Feb 28 1986	Response requested.
Mar 28 1986	Motion of appellee Florida to dismiss filed.
Apr 3 1986	REDISTRIBUTED, April 18, 1986
Apr 10 1986	Reply brief of appellant Bret Clark filed.
Apr 21 1986	REDISTRIBUTED, April 25, 1986
Apr 28 1986	Appeal DISMISSED for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari DENIED. Opinion by The Chief Justice respecting the dismissal. (Detached opinion.)

**********>

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 85-6004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT

COURT OF APPEAL, STATE OF FLORIDA

BRET CLARK, APPELLANT
Proceeding Pro Se
Suite 500
Miami National Bank Building
8101 Biscayne Boulevard
Miami, Florida 33138
(305) 759-2001

11PP

QUESTION PRESENTED

Is Florida Statute Section 57.105 unconstitutional and thus void?

BASIS FOR JURISDICTION

Appeal is taken from an order of the 5th District Court of Appeal, State of Florida, rendered in connection with an appeal proceeding in that court on September 12, 1985. The order upheld the validity of the statute in question after appellant had drawn its validity in question, as being repugnant to the Constitution and laws of the United States. Since no appeal thereof is available to the Florida Supreme Court, the Notice of Appeal was filed with the Fifth District Court of Appeal on December 2, 1985. This Court therefore has jurisdiction under 28 U.S.C. Section 1257(2).

AUTHORITIES INVOLVED

United States Constitution, amendment I:

> Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances.

United States Constitution, amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statute Section 57.105 (1985):

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party.

STATEMENT OF THE CASE

An appeal proceeding was pending in the Fifth District Court of Appeal, State of Florida. During the course of this proceeding, the appellant filed motions and sent correspondence to the court that were

highly critical of the manner in which the court from which the appeal was taken, and the Fifth District court, had handled the case. In response to one such letter, the Clerk of the Court replied by inviting appellant to file a pleading with the court, which appellant did. The opponent of appellant then filed a response, bitterly denouncing appellant and asking that the court "review the correspondence and pleadings in this cause" before punishing appellant by assessing attorney's fees against him. Appendix at A-4. The Court agreed, entering an order to that affect. Appendix at A-5.

Appellant then filed a motion to review the order granting attorney's fees, raising for the first time his contention that the statute relied upon is repugnant to the Constitution and laws of the United States. Appendix at A-13 to A-16. This motion was then denied on September 12, 1985. Appendix at A-1. Appellant then wrote to the Supreme Court of Florida to confirm that the order could not be appealed to that court. Appendix at A-17. By letter dated November 14, 1985, the Florida Supreme Court confirmed this fact. Appendix at A-18. The notice of appeal was then filed with the Fifth District Court of Appeal. Appendix at A-2.

IMPORTANCE OF QUESTION

The question presented is so substantial as to require plenary consideration because the issues effect the right of individuals to gain access to the courts, and to complain to a court about mistreatment. The Fifth District Court of Appeal of the State of Florica obviously does not welcome criticism of the way it operates, and has abused its powers in order to punish appellant for his attempt to do so. The assessment of attorney's fees against him is not compensatory, as his opponent is an employee of the State who is paid a salary. There was no allegation that appellant brought his appeal in the State courts in bad faith or for oppresive reasons, which is a basis for assessing attorney's fees under federal case law. The statute relied upon to impose these fees turns upon the vague concept of what constitutes a "justicable issue." Consequently, litigants are forced to guess as to its meaning, and are therefore deterred from seeking relief in Florida courts. For these reasons, the Court must give plenary consideration to this appeal.

Respectfully submitted,

BRET CLARK, APPELLANT
Proceeding Pro Se
Suite 600
Miami National Bank Building
8101 Biscayne Boulevard
Miami, Florida 33138
(305) 759-2001

NO. 85-6004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

MOTION TO DISMISS

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067
COUNSEL FOR APPELLEE

AUTHORITIES CITED

OTHER AUTHORITIES CITED

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO DISMISS

The appellee moves the Court to dismiss the appeal herein since it seeks review of a state court proceeding which involved no federal question; to the extent a federal question was at all raised by the appellant, it was neither timely nor properly raised and thus not expressly passed upon. Rule 16.1 (b).

NATURE OF THE CASE AND THE PROCEEDINGS BELOW

Petitioner Clark received a speeding ticket. He contested the speeding ticket, went to trial, and was found guilty and fined.

Under the combined provisions of Article V, Section 5 (b) of the Florida Constitution (1981), and section 26.012 (1), Florida Statutes (1983), Clark was entitled to appeal the finding of the county court. He did so and on September 4, 1984, the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Lake County, sitting in its appellate capacity, affirmed the judgment of the county court without opinion.

Further appellate review was possible by seeking a writ of certiorari in the District Court of Florida, Fifth District. Art. V, §4 (b)(3), Fla. Const. (1981). Florida Rule of Appellate Procedure 9.100 (c), requires that a petition for writ of common law certiorari be filed within thirty (30) days of the rendition of the order sought to be reviewed or, in this case, no later than October 4, 1984.

On February 14, 1985, some four months after the required

filing date, Clark filed his petition, and on March 12, 1985, the Fifth District Court of Appeal ordered the state to show cause why the petition should not be granted. (A 1) On March 28, 1985, the state filed its response which contained a position raising the jurisdictional bar based on the untimely filing of the petition. (A 8)

On April 15, 1985, the appellate court issued its order dismissing the petition for lack of jurisdiction. On April 30, 1985, Clark filed a motion for rehearing. (A 13) As is indicated on page 15 of Clark's appendix to his jurisdictional statement, that motion was stricken as untimely. (See, Fla. R. App. P. 9.330 (a)) Over a month later, Clark filed a motion to recall mandate and a suggestion for reconsideration. (A 15) The state promptly responded and for the grounds set forth therein, moved for attorney's fees. (A 16) The court just as promptly denied the motion for recall and gave Clark five days within which to show cause why the motion for attorney's fees should not be granted. (A 18) In the meantime, Clark filed a reply to the state's response. (A 19)

Clark responded to the order to show cause on July 17, 1985, (A 22) and on July 25, 1985, the court granted the state's motion for attorney's fees. (A 25)

Almost a month later, Clark filed a motion to review the order granting fees, (A 26) and in a concluding paragraph, as an apparent afterthought, contended for the first time that the Florida statute under which the attorney's fees were moved was "repugnant to the constitution and the laws of the United States of America." (A 27) On September 12, 1985, the appellate court denied the motion, (A 28) and it is from this order that Clark appeals.

ARGUMENT

The invalidity of section 57.105, Florida Statutes, for any reason and/or its repugnancy to the United States Constitution was neither timely nor properly raised in the proceedings below. In fact, the statute is wholly inapplicable to what

transpired. While it is true that the state moved for attorney's fees pursuant thereto, what Clark has overlooked is the fact that attorney's fees were awarded pursuant to Florida Rule of Appellate Procedure 9.400 (b). (A 25) Clark, at least at one time, recognized this since his motion to review the order granting fees was predicated upon that particular rule. (A 26)

It is thus clear that the constitutional validity of the state statute was never passed upon by the court below. Indeed, it is being more than charitable to assume that the court was even presented with the constitutional challenge, however late. Under Florida law, it has been held that the time to object to an award of appellate attorney's fees is by appropriate motion prior to the court's consideration of the motion for assessment. Special Disability Trust Fund v. Wareham, etc., 381 So.2d 257 (Fla. 1st DCA 1980). In addition, the court there went on to observe that attorneys should always help a court in its consideration of all issues presented to it by timely and fully presenting the court all authorities, pro and con, on the issues.

Compliance with this principle indicates that Clark was required to have raised all reasons why he should not be assessed attorney's fees when specifically given the opportunity to do so by the court of appeal. This he did not do. If he thought that section 57.105 was invalid for any reason whatsoever as a source for properly awarding attorney's fees, then he should have "raised" that issue at the appropriate time.

Admittedly, rule 9.400(c) contains provisions for a review of orders assessing attorney's fees; such review, however, is more appropriately sought when an appellate court determines the right to attorney's fees and remands the cause to the lower court for purposes of fixing those fees. Should a party be aggrieved by said "fixing", then the party may return to the appellate court for review. This was explained in Gernat v. Gernat, 378 So.2d 339 (Fla. 4th DCA 1980); see also, Fla. R. App. P. 9.400, committee note 3; State v. LoChiatto, 381 So.2d 245 (Fla. 4th DCA 1979).

Our research reveals no case dealing with the situation in which an appellate court has assessed attorney's fees under Florida appellate procedural rules. However, based on the above, when an appellate court does assess attorney's fees, it is our contention that such an act is just like any other appellate court decision. As such, either a motion for rehearing and/or clarification pursuant to Florida Rules of Appellate Procedure 9.330 is the sole appropriate vehicle to seek further consideration. That rule requires that a motion be made within fifteen (15) days of the order. If one were to view Clark's motion to review as such a motion for rehearing and overlook the fact that it would have been untimely under that rule, then it is still seen that the question of the validity of the statute was still not properly raised. Under Florida law a party seeking rehearing under rule 9.330 may only raise points of law or fact that have been overlooked or misapprehended by the court. Re-argument or arguments raised for the first time are simply not permitted. Sarmiento v State, 371 So.2d 1047 (Fla. 3d DCA 1979). This procedural requirement has been the law in Florida for a hundred years. Jones v. Fox., 23 Fla. 462, 2 So. 853 (Fla. 1887), and has indeed been recognized by the court as the status of Florida law. Hanson v. Denckla, 357 U.S. 235, 244 (1958).

CONCLUSION

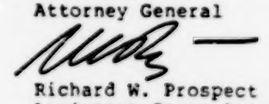
This case, although the subject of considerable judicial attention, has been troubled by two common elements -- untimeliness and only casual observance of proper state procedural rules. Every pleading Clark filed after the affirmance of his speeding ticket was either late or inappropriate and filed with but a minimal knowledge of relevant procedure. That which started him litigating in the Fifth District Court of Appeal was filed almost four months late. Even after being informed that the court was without jurisdiction to entertain the petition, Clark nevertheless persisted in his efforts to obtain something to which he was not legally entitled under state law. When that persistence resulted in a motion for

him to pay for the state's costs in the litigation, he was given an opportunity to show cause why such an assessment should not issue. At most, Clark only offered reasons which had nothing to do with the purpose of the motion. Contrary to his belief, the state did not seek punishment for Clark; rather, it only sought reimbursement for the time one of its attorneys had to spend representing the state in an action in a court which had determined that it was without jurisdiction to act. The decision of the court of appeal was one neither of vengeance nor spite. It was an act determining the existence of a right to be reimbursed.

Clark never raised the constitutionality of the statute which was not the basis of the court action and if he did, it was in an improper and untimely fashion with the result that the federal question made the basis of his appeal was non-existent below. Accordingly, the state respectfully requests the Court to enter its order dismissing this appeal.

Respectfully submitted,

Jim Smith
Attorney General



Richard W. Prospect
Assistant State Attorney
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. 85-6004 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPENDIX TO MOTION TO DISMISS

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067
COUNSEL FOR APPELLEE

29 pp

IN THE DIS .ICT COURT OF APPEAL OF T. S.ATE OF FLORIDA
FIFTH DISTRICT

BRET CLARK

Petitioner,

v.

STATE OF FLORIDA

Respondent.

CASE NO. 85-237

DATE: March 12, 1985

BY ORDER OF THE COURT:

ORDERED that Respondent, State of Florida, shall file with this Court and show cause, within twenty days from the date hereof, why the PETITION FOR WRIT OF CERTIORARI, filed February 14, 1985, should not be granted.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach (with copy of Petition)
Bret Clark, pro se
State Attorney's Office, 5th JC

A-1

IN TH .TH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Bret Clark,
Petitioner,
v.

State of Florida,
Respondent.

Case No.

PETITION FOR WRIT OF CERTIORARI
TO THE FIFTH CIRCUIT COURT
IN AND FOR LAKE COUNTY, FLORIDA

Petitioner herewith files this petition for writ of certiorari and alleges as follows (see, Fla. R. App. P. 9.100(e)):

(1) Basis of Jurisdiction

The Court has jurisdiction of this action to review a final order of the above-named court acting in its review capacity. Fla. R. App. P. 9.030 (b)(2)(B). As appears more fully below, the circuit court entered an order affirming a decision of the Lake County Court. Appellant first learned of this order on January 14, 1985, after his license had already been suspended (the Lake County Court convicted Petitioner of a traffic offense). see, Appendix at A2.

At this writing, Petitioner has not as yet determined if or when the order sought to be reviewed in this Court became "rendered" for purposes of marking the time within which the instant petition had to be filed. see, Fla. R. App. P. 9.020(g). Although ordinarily a petition not filed within the prescribed time prevents the court from taking jurisdiction, an exception to this rule permits the Court to exercise jurisdiction herein (the filing date of the order to be reviewed is not apparent from any stamp on its face, but Petitioner presumes it was recorded shortly thereafter). see, Appendix at A1. In certain circumstances, full appellate review will be afforded when to do otherwise would so deny fundamental fairness as to rise to a denial of due process. Hollingshead v. Wainwright 194 So. 2d 577 (Fla 1967); State ex rel. Ervin v. v. Smith 160 So. 2d 518 (Fla. 1964).

In the case at bar, Petitioner was denied the benefits of the notice provisions built into the statutory scheme designed to inform motorists of proceedings involving traffic citations. see, Appendix at A3. This scheme, and

A-2

the interpretatic n its application in Addleman veal the legislative intent that the inherent difficulties of keeping a transitory class of litigants be ameliorated by notifying motorists using registered mail when the process of license suspension is initiated. In Petitioner's situation, had he been informed in this manner prescribed by law, he would have been in a position to take action before the effective date of his suspension in addition to being placed on notice of the decision affirming his conviction. see, Appendix at A4, A5 and A7.

Petitioner submits that the importance of notifying a motorist that the time to take an appeal has begun to run is at least equal to that of notifying him that the process of suspension has been initiated. In any event, the misconduct causing Petitioner to not be notified of the order entered in his case until 4 months after its issuance allows the Court to exercise jurisdiction in this action because the desire to seek full appellate review has been frustrated by state action. see, Leggett v. Wainwright 297 So. 2d 605 (1st D.C.A. 1974), in which the court applied Hollingshead, supra. Accordingly, this Court has jurisdiction hereof.

(2) Facts

Petitioner was cited for speeding on the Florida Turnpike on August 12, 1982. The trooper used a radar detection device for this arrest, but when Petitioner attempted to confirm the readout, it was blank. The officer explained that it was standard policy not to lock the digital display when deciding to issue a citation. When Petitioner began to protest his innocence, the trooper stated that any attempt to contest his fine would place Petitioner at the risk of incurring a "double or nothing" sentence.

At trial objection was made to the proffered testimony of the arresting officer on the grounds that denying an independant verification of the readout on the radar device at the scene of the citation violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The trial judge then found Petitioner guilty and assessed a fine of $100.00, exactly twice his original penalty. Appeal was then taken to the Fifth Circuit Court in and for Lake County, Florida.

Two years later, Petitioner received the order from the Department of Highway Safety and Motor Vehicles suspending his driving "priviledge" and demanding return of his license. After making inquiry to the Clerk of the court, Petitioner learned on January 14, 1985 that the Circuit Court had affirmed the decision of the County Court without explanation, whereupon this petition was filed to review the order to that effect.

(3) Relief Sought

Petitioner requests that the Court grant certiorari, quash the order entered by the Circuit Court, and direct that his license be restored forthwith, or, in the alternative, that the sentence be reduced to $50.00.

(4) Argument

A. A speeding conviction is invalid under the Sixth Amendment when the digital display of the radar device used by the arresting officer in his decision to cite the defendant is not shown to him at the scene of the arrest.

Few traffic cases have reached the United States Supreme Court on the above issue, and its not likely that one ever will. By their nature, cases involving traffic offenses are not easily susceptible to judicial review, in part because the cost of seeking review far exceed the benefit derived from a successful challenge to the citation. The Circuit Court here declined to expound upon Petitioner's Sixth Amendment claim, giving little to guide this Court in its disposition herein.

The Supreme Court has had occasion, however, to delineate the scope of a police officer's authority when pulling over a motorist in the area of unreasonable searches and seizures. see, discussion of United States v. Ross, Appendix at A11. This case presented to the Circuit Court a similar situation involving the Sixth Amendment right of Confrontation, wherein the Petitioner sought to inspect the radar device at the scene of his citation, in order to help preserve the veracity of the issuing officer's testimony later in the courtroom.

Petitioner submits that the prevalence of the automobile in modern society calls for the imaginative interpretation of the Sixth Amendment here advanced. The Supreme Court has apparently recognized that practicality compels the substitution of officers for judges, where the exigency of the situation at the scene of the arrest creates the need to view the police as the "functional equivalent" of a magistrate. Appendix at A32. Although this pragmatism is normally associated with efforts to expand the power of the police to conduct what would otherwise be an impermissible search, the same principle should apply in favor of the accused to hold the arresting officer to the same limitations that regulate a judge's authority.

In the instant case, practicality demands that Petitioner, and other motorists throughout the state, be afforded the opportunity to verify the testimony of an officer who uses a radar device at the scene of the citation.

Viewing the trooper here at issue as the functional equivalent of a magistrate when he pulled Petitioner over to the side of the road, the question then arises as to whether a judge at this "roadside trial" would be permitted to convict the motorist based upon his own contentions of what the radar device said, when it would have been a simple matter of fixing the readout on the digital display of the radar and showing it to the motorist. Since the officer here declined to do so, his testimony as to the digital readout was the only evidence that Petitioner had exceeded the speed limit, which would place him in the position of being both the judge and the prosecution's sole witness.[1] Because the trooper's testimony was the basis of the conviction, the order of affirmance should be quashed, the conviction reversed and the case dismissed.

B. A sentencing procedure which systematically discriminates against those who plead not guilty by imposing "double or nothing" fines is unconstitutional.

With the crush of litigation facing the courts, the temptation to reward those who plead guilty as part of a negotiated plea, and to punish those who insist on their right to go to trial, is somewhat understandable. That does not, however, make it constitutionally valid. United States v. Jackson 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968); Baker v. United States 412 F. 2d 1069 (5th Cir. 1969); and Weatherington v. State 262 So.2d 724 (Fla. 3rd D.C.A. 1972).

In addition to the treatment Petitioner received as a result of his invokation of the right to plead not guilty and go to trial, he had the opportunity to observe the pattern of sentencing by the traffic court prior to his case coming up for hearing. Appendix at A39. Taken together with the trooper's admonishment that Petitioner's case would be for "double or nothing", an inference can be drawn that these sentencing procedures are widespread. Appendix at A13.

Applying Jackson to the sentence imposed by the Circuit Court, the Second District Court of Appeals reversed, noting the sentencing court's candid admission that the disposition of the case would have been more lenient had the defendant entered a guilty plea. Gillman v. State 373 So. 2d 935, 938 (Fla. 2nd D.C.A. 1979). Consequently, the doubling of Petitioner's fine was

---

1 / Canon 3, subsection C(1)(b) of the American Bar Association's Code of Judicial Conduct (1972) states that a judge should not preside in a proceeding where he (or she) has been a material witness.

clearly improper [illegible]ase:

> The law is clear that any judically imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.

Id.

Similarly, unequal treatment of those who assert their innocence cannot be countenanced in a judicial system that presumes innocence and rightly holds in high esteem an individual's right to trial. Gallucci v. State 371 So. 2d 148, 150 (Fla. 4th D.C.A. 1979). Systematically doubling traffic fines upon pleading not guilty has the effect of imposing "punishment for going to trial" and is unquestionably unconstitutional. Id. Particularly in light of the inherent disuasions to contesting traffic citations, the fine imposed on Petitioner should be reduced accordingly. see, supra at 3.

C. A state statute which unreasonably burdens or restricts a person's right to freedom of travel is unconstitutional.

Petitioner was charged with speeding in excess of 55 miles per hour on the Florida Turnpike under Fla. Stat. §316.183(2), which sets arbitrary limits on the rate of speed all vehicles may travel. The Court may take judicial notice of the fact that the 55-mile-an-hour limit was enacted in response to a shortage of petroleum during the mid-1970s. Today, a worldwide glut in the oil market has made this justification for the speed limit obsolete. This leaves safety as the primary purpose behind the speed limit.

As in the case of Petitioner, automobiles are chosen almost at random by patroling officers who cite offenders irrespective of whether the conditions make the speed at which the vehicle is travelling unsafe. This creates the absurd result that where a motorist exceeds the speed limit to avoid an unsafe traffic situation, he may nonetheless be cited for violating Florida law which obstensibly is designed to promote safety. Appendix at A36-A38. Aside from the potential for abuse of discretion that such an essentially administrative scheme, imposed by peace officers, holds, where a motorist is cited without a showing that his speed is unsafe under the circumstances,[2] imposition of a fine for exceeding an arbitrary speed limit unreasonably restricts the fundamental right of travel guaranteed by the United States Constitution.

2/ In the absence of a fixed speed limit, Fla. Stat. §316.183(1) still prevents driving at a speed greater than is reasonable and prudent under the conditions.

In Shapiro v. Thompson 394 U.S. 618, 89 S.C' 22, 22 L.Ed. 2d 600 (1969) the United States Supreme Court stated that the Court had long recognized that the nature of the Federal Union created by the constitution, and the personal liberty of its citizens requires that freedom of travel be preserved uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. Petitioner's conviction in this case unreasonably restricts his right to travel, calling for a strict scrutiny of the application of the speed limit statute to his movement, and that the least drastic means of enforcing any compelling state interest be utilized. Because there is no showing that Petitioner was driving too fast under the conditions pursuant to section 316.183(1) his conviction should be reversed and the case dismissed.

Respectfully Submitted,

Bret Clark, Petitioner
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was caused to be mailed this 14 day of February, 1985 to: Jeffery M. Pfister, Assistant State Attorney, P.O. Box 1086, 315 W. Main Street, Tavares, FL 32778.

Bret Clark
Attorney at law

File

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

BRET CLARK,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 85-237

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Comes now, the STATE OF FLORIDA, and pursuant to Florida Rule of Appellate Procedure 9.100(h), and this court's order to show cause dated March 12, 1985, and responds to the Petition for Writ of Certiorari.

I. JURISDICTION

Petitioner alleges he does not know when the order sought to be reviewed (A1) was rendered, but admits that his Petition for Writ of Certiorari was filed untimely. Consequently, based upon petitioner's own allegations, the petition should be dismissed. Flinchbaugh v. Burton, 312 So.2d 827 (4th DCA 1975). Petitioner's reliance on the habeas corpus cases to apply for belated review is misplaced, since he is not in custody. Case v. Smith, 10 F.L.W. 632 (1st DCA March 12, 1985). Further, there is no evidence whatever of any state misconduct in improperly notifying petitioner, since it was apparently he who failed to keep the lower court appraised of his current address. See, (A2). Lastly the petition is untimely under any possible interpretation of the notice given petitioner, since it was filed February 14, 1985, which is thirty-one (31) days after petitioner actually received the order sought to be reviewed on January 14.

Respondent respectfully submits no basis for jurisdiction has been demonstrated by petitioner, and the cause should be dismissed.

In the event this court finds jurisdiction of the cause, respondent urges that this petition presents exactly the type of situation where a district court should use its discretion in declining to accept review "to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal". Combs v. State, 436 So.2d 93, 96 (Fla. 1983). The issues presented here could all have been presented to the circuit court, and that court ruled adversely to petitioner. The case presents no issue of such magnitude that certiorari is warranted. Combs.

II. THE MERITS

A. Viewing the digital display.

Petitioner presents three issues for review. The first is that he must be afforded an opportunity to view the radar gun, or the trooper issuing the speeding citation should not be permitted to testify. He presents no authority for this position, other than a patently inapposite discussion of the role of the officers on the scene based on U.S. v. Ross. (No citation given). Whatever the role of officers at the scene, the "neutral Magistrate" in the courtroom is the judge, who can accept or reject the officer's testimony. Sixth Amendment Confrontation Rights pertain to witnesses, not physical evidence, State v. T.L.W., 457 So.2d 566 (2d DCA 1984); the officer was present in court and subject to petitioner's cross-examination. See generally, State v. Johnson, 345 So.2d 1069 (Fla. 1977).

Respondent, further, would take exception to petitioner's allegation that the officer's testimony as to the digital readout was the only evidence of speeding. At least, this cannot be assumed in the absence of a record. The officer was apparently tailing petitioner, (A27), and thus would have his own speedometer reading. Petitioner admits he speeded up. (A 37). He claims it was necessary to speed up to allow the vehicle behind him to pass. (A 37). However, the reasonableness

of petitioner's action would surely be a factual issue for the trial judge sitting as finder of fact. Respondent would also call attention to Section 316.1906(2)(a), Florida Statutes, which provides that the radar evidence is inadmissible unless the trooper "has made an independent visual determination that the vehicle is operating in excess of the applicable speed limit". Thus, it is quite possible the radar evidence was unnecessary. The state would also note that petitioner nowhere suggests that the "lost" radar evidence would have been favorable to him, thus no prejudice is shown. See, James v. State, 453 So.2d 786 (Fla. 1984); State v. Sobel, 363 So.2d 324 (Fla. 1978).

B. Increased Sentence for Going to Trial

Section 318.18, Florida Statutes, provides for standard "offers of settlement" for certain noncriminal traffic infractions. A ticketed driver has the right to "settle" for these civil penalties if he so chooses, in lieu of a fine being determined by a court. However, if a driver wishes to waive this right, he may do so, and the trial judge may set a fine of up to $500.00. § 318.14(5), Fla. Stat. (1984). Thus, even if $100.00 was the traffic court judge's "standard" fine, there is no due process violation. Levitz v. State, 339 So.2d 655 (Fla. 1976).

C. 55 Mile Per Hour Speed Limit is Unconstitutional

A 55 mile per hour speed limit is obviously rationally related to a permissible state purpose, i.e., safety on the highways. Motor vehicles are dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all who use its highways. Hess v. Pawloski, 274 U.S. 352, 356; 47 S.Ct. 632, 633; 71 L.Ed.2d 1091 (1927).

CONCLUSION

The petition for Writ of Certiorari should not be entertained by this court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ellen D. Phillips

ELLEN D. PHILLIPS
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Petition for Writ of Certiorari has been furnished, by mail, to Bret Clark, at 7630 Biscayne Boulevard, Suite 202, Miami, Florida 33138, this 28th day of March 1985.

Ellen D. Phillips
ELLEN D. PHILLIPS
COUNSEL FOR RESPONDENT

IN THE DI[illegible] COURT OF APPEAL OF T[illegible] ATE OF FLORIDA
FIFTH DISTRICT

Phillips
MKG

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: April 15, 1985

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF CERTIORARI, filed February 14, 1985, is hereby dismissed for lack of jurisdiction.

I hereby certify the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK
By: [signature]
Deputy Clerk

(COURT SEAL)

cc: Bret Clark
Attorney General's Office, Daytona Beach ✓

IN THE [illegible] DISTRICT COURT
OF APPE[illegible]TE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

_____/

MOTION FOR REHEARING

COMES NOW, the petitioner herein, respectfully moving this Court pursuant to Florida Rule of Appellate Procedure 9.330 for rehearing of this Court's order dated April 15, 1985. In support thereof is the following:

This Court entered its order denying the within petition for writ of certiorari for want of jurisdiction. This order was entered prior to the time within which petitioner was to file his reply to the response served by the government on March 28, 1985. The Court therefore overlooked and misapprehended the following points made by the respondent to which petitioner would like to reply:

1. Respondent states at 1 that petitioner has somehow admitted that the petition filed herein was untimely. No such admission was made, and the petition clearly states that he cannot discern from the documents he has received whether the order entered by the circuit court had been filed with the Clerk of the Court. Consequently, petitioner cannot concede the issue of timeliness unless and until this factual question is resolved.

2. Respondent asserts that the petition was filed 31 days after petitioner received the order sought to be reviewed. Respondent has apparently counted the day on which the order was received in computing this time period. Fla.R. App.P. 9.420(e) specifically excludes the day from which the period begins to run, in computing the deadline for documents to be filed or served.

3. Respondent claims that there is no evidence of misconduct in the handling of his case. Petitioner has shown that the clerk of the

lower court violated the notice provisions of Fla. law relating to the suspension of licenses. Had the clerk complied with these notice provisions, petitioner would have been in a position to inquire as to the status of his case prior to the effective date of the suspension, and (assuming that the order at issue has been properly filed), within the time for taking an appeal.

4. Respondent also makes the argument that the issues involved herein do not merit the attention of the Court. Petitioner would like an opportunity to respond to this assertion and the arguments presented by the respondent in full by the filing of a reply under Fla.R.App.P. 9.100(1).

WHEREFORE, and in consideration of the foregoing, petitioner respectfully prays that the court grant a rehearing of the order entered by the court denying the petition for want of jurisdiction.

I DO HERBY CERTIFY that a true and correct copy hereof was caused to be served by mail this 25th day of April, 1985, upon Ellen Phillips, Esquire, Assistant Attorney General, 125 N. Ridgewood Ave., Fourth Floor Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

_____/

RECEIVED
JUL 8 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

MOTION FOR RECALL OF MANDATE
AND SUGGESTION FOR RECONSIDERATION
ON THE COURT'S OWN MOTION

COMES NOW, the petitioner herein, in proper person, respectfully moving this Court pursuant to Fla.R.App.Pro. 9.340 and the inherent power of the Court to recall the mandate, or otherwise set aside the order striking petitioner's motion for rehearing, and to suggest that the Court reconsider the order denying the petition upon its own motion. In support thereof is the following:

The Court in its discretion may withdraw a prior decision and mandate in this cause. Fowler v. State, 443 So.2d 125 (5th DCA 1984). In the interest of justice, petitioner requests that the Court do so herein because the issues raised by the petition have not been fully and fairly litigated, and are of great public importance. In the alternative, petitioner suggests that the Court may rule on the motion for rehearing on the merits by reconsideration of its order denying the petition upon its own motion. Rogers v. State Farm, 390 So.2d 138 (5th DCA 1980).

I DO HEREBY CERTIFY that a true and correct copy hereof has been served by mail this 3rd day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Petitioner
7630 Biscayne Blvd. #202
Miami, FL 33138
(305) 759-2001

A-15

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

BRET CLARK, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. 85-237

RESPONSE TO MOTION FOR RECALL OF
MANDATE AND MOTION FOR ATTORNEYS' FEES

COMES NOW, respondent, the State of Florida, by and through the undersigned counsel, and responds to petitioner's motion to recall mandate by hereby moving for attorney's fees pursuant to Florida Statutes section 57.105. As grounds for this motion, respondent shows:

1. This cause originated when petitioner, as a law student, received a speeding ticket. He contested the speeding ticket, went to trial, and lost.

2. Petitioner's appeal to the circuit court was reviewed on the merits and affirmed without opinion September 4, 1984. (Petitioner's Appendix A-1).

3. Petitioner filed an untimely petition for certiorari to this court February 14, 1985. He moved to proceed as an indigent although he had graduated from law school, and was admitted to the bar in 1984.

4. Respondent was required to expend time and effort responding to petitioner's essentially frivolous issues.

5. The petition was dismissed for lack of jurisdiction.

6. Petitioner's motion for rehearing was striken as untimely.

7. Petitioner has now filed a totally frivolous "Motion to Recall Mandate." The motion is a sham pleading in that:

a). Term of court ended yesterday, thus mandate, if one existed, could not be recalled; and

A-16

b). No mandate ever issued, since the petition was dismissed.

Petitioner's motion demonstrates a startling ignorance of the law, and, more importantly, an unwillingness to expend even minimal effort to research facts or law before taking the time of this counsel and this honorable court. Respondent respectfully urges this court to review the correspondence and pleadings in this cause, which amply demonstrate petitioner's misconception that his law training entitles him to file whatever he wants whenever he wants without the slightest regard for the law or judicial resources. Respondent prays for an order awarding costs and reasonable attorney's fees against petitioner for review of his motion, research, and this response.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Ellen D. Phillips

ELLEN D. PHILLIPS
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Bret Clark, pro se, 7630 Biscayne Blvd., Suite 202, Miami, Florida 33138, this 9th day of July, 1985.

Ellen D. Phillips
Of Counsel
Ellen D. Phillips

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Phillips
no. 6

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: July 12, 1985

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION FOR RECALL OF MANDATE AND SUGGESTION FOR RECONSIDERATION ON THE COURT'S OWN MOTION, filed July 8, 1985, is denied. It is further

ORDERED that the Petitioner, Bret Clark, shall file with this Court and show cause, on or before five days from the date hereof, why Respondent's MOTION FOR ATTORNEYS' FEES, filed July 9, 1985, should not be granted.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Bret Clark, (certified mail)
Attorney General's Office, Daytona Beach ✓

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,

Petitioner,

v.

State of Florida,

Respondent.

REPLY TO COMBINED RESPONSE TO
MOTION AND REQUEST FOR
ATTORNEY'S FEES BY RESPONDENT

Petitioner herewith files this reply to respondent's response to petitioner's motion for recall of mandate and for reconsideration of the Court's order dismissing the petition for want of jurisdiction:

The within petition seeks review of a one word decision by the Circuit Court below affirming a finding by the County Court that petitioner was guilty of speeding. Petitioner was not notified of this affirmance until after his license had been suspended, and never received a notice that payment of his fine was past due prior to the order suspending his license. Thereafter, a petition was promptly filed in this Court which was dismissed for want of jurisdiction before petitioner could file a reply to the response thereto. The Court then struck a motion for rehearing as untimely, and petitioner then filed a motion, after corresponding with the Clerk of the Court, and a suggestion that the Court reconsider its order upon its own motion, to which the State responded.

In essence, the response constitutes a personal attack on the petitioner, charging him with incompetence, implying that he had no right to proceed as a pauper and did so wrongfully, stating that the Court and counsel for respondent should not be bothered with having to respond to the issues raised herein and accusing petitioner of engaging in frivolous and unsupportable proceedings for some unstated motive.

As an attorney, petitioner can understand that advocating a position in court may tend to cloud a lawyer's ability to appreciate the maxim that there is always two sides to every dispute, and this in turn may lead counsel to denounce the opposition, rather than focusing on the issue at hand. Thus, during the course of the diatribe against petitioner by respondent, the arguments raised by the document to which the response is obstensibly aimed are left unrebutted. Although respondent complains that petitioner is ignorant of the law and fails to research questions of law or fact before taking up its valuable time (as if the substantial time spent by petitioner on this case is of no consequence), respondent itself fails to cite authority in support of its motion or to make any coherent legal argument. In short, the motion filed by respondent demonstrates a shocking degree of arrogance and lack of professionalism.

In Rogers v. State Farm, 390 So.2d 138 (5th DCA 1980) cited by petitioner, this Court, after striking a petition for rehearing as untimely, decided to reconsider its decision rendered in the case upon its own motion. Respondent studiously avoided mentioning this case, prefering instead to ridicule the alternative argument of "recalling the mandate" made in petitioner's motion. The thrust of both of these arguments is that the Court may, in the exercise of its discretion, set aside a previous ruling in the interest of justice. The response to this argument does not argue a countervailing principle, it simply attacks the credibility of the author.

After nearly three years of litigation on this matter, petitioner has yet to receive a full and fair treatment of the issues raised in this case. If these issues were wholly without merit, as suggested by the respondent, why has it chosen to dispose of the appeal on a technical argument, rather than face the merits of the case? As a member of the bar, petitioner would be ethically bound to refrain from arguing positions that clearly have no other purpose than to harass, and should at the very least be given the benefit of the doubt on this question. Indeed, respondent has not given a lucid explanation of why petitioner would expend so much time and effort over what it apparently feels is a trival matter undeserving of redress in courts the right of access to is a cherished constitutional freedom.

The truth of the matter is, respondent does not feel that traffic citations and proceedings thereon are important enough for legal reasoning or constitutional principles to be brought to bear upon their adjudication.

As a result, traffic courts have become a law unto themselves, with only the quite distant potential that a motorist who was treated unfairly might take it upon himself to seek fairer treatment in the name of principle and the benefit of the many.

Respondent, by its motion, reveals that it has nothing but contempt for a law student who does not simply permit an injustice to run its course, paying an unjust penalty. No matter how small this penalty may seem, the people are entitled to petition the government to protest these injustices, and the desire of respondent to make light of them lends aid to their perpetuity and proliferation, bringing the judicial system into disrepute in the eyes of the public.

Petitioner was such a student, and is now a lawyer, but this latter fact does not mean that he has given up these principles. Many lawyers and aspiring lawyers are criticized in today's society for giving up the nobler missions the job entails for the pursuit of monetary enrichment. This assumption is implicit in respondent's suggestion that because he is a member of the bar, petitioner cannot possibly be a pauper. Again, petitioner is ethically bound to refrain from making such an application before the court if it had no basis in fact, and has not done so in this cause.

Contrary to the belief of respondent, traffic cases are important, and petitioner can attest to the hardship denial of the freedom to travel can have on a person. The issues which have led a long path to this Court are deserving of consideration on the merits, or petitioner would not have pursued them. Accordingly, the motion of respondent should be denied and the order dismissing the petition should be set aside.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail this 11th day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

MKG

Phillips

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

Bret Clark,
Petitioner,
v.
State of Florida,
Respondent.

RECEIVED
JUL 22 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

RESPONSE TO ORDER TO SHOW CAUSE

Petitioner herewith files this response to the Court's order to show cause why the respondent's motion for attorney's fees should not be granted:

1. Petitioner incorporates by reference, as if fully set forth herein, his reply to the subject motion served prior to receipt of the Court's order to show cause.

2. Respondent relies upon Florida Statute 57.105 which provides for the award of attorney's fees where a losing party's position is completely lacking any justicable issue of law or fact. Respondent's motion claims that no support for petitioner's motion requesting that this Court reconsider an order entered by it upon its own motion exists, requiring it to expend time responding to the request. Petitioner relied for this motion on this Court's ruling in Rogers v. State Farm, 390 So2d. 138 (5th DCA 1980). Although respondent did not offer an argument in opposition to this authority, aside from an assault upon petitioner's personal and professional reputation, a justicable issue was presented as to whether the Court should have reconsidered its earlier ruling on its own motion.

3. Respondent asserts that petitioner's issues are "essentially" frivolous, not that there is a complete absence of any justicable issue. Respondent charges that petitioner does not research law or fact before filing papers with the Court, but its motion is itself devoid of any authority or analysis and accordingly should be denied.

4. Article I section 21 of the Florida Constitution provides that the courts of this State shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay. The record in the instant cause reveals that petitioner has not been afforded a fair adjudication of the issues raised in this cause. His license was suspended without notice or an opportunity to be heard, in violation of Florida law, and as a result his appeal to this Court was ultimately prejudiced, and now respondent has attempted to compound the procedural unfairness of this result by further denying petitioner meaningful access to the judicial process. The policy of the statute upon which respondent relies is not to cast a chilling effect on the use of the courts. Stevenson v. Rutherford, 440 So2d 28, 29 (4th DCA 1983).

5. Because statutes, such as the one at issue here, are in derogation of the common law where they provide for the award of attorney's fees, they must be strickly construed. Whitten v. Progressive Cas. Ins. Co., 410 So2d 501, 505 (Fla. 1982). In light of the Rogers case cited supra, and the perfectly reasonable argument that the Court would not dispose of a case on a highly technical ground which would deny justice to a litigant by placing form over substance, this Court cannot conclude that a suggestion that it reconsider a ruling on its own motion for this reason is so clearly devoid of merit as to be completely untenable. Id., quoting Allen v. Estate of Dutton 384 So2d 171 (Fla 5th DCA 1980). Although the judiciary has undergone criticism from the press and public for a perceived denial of justice on the grounds of "legal technicalities", petitioner would argue that he at least has the right to present the argument that denying his petition for such technical reasons should not be permitted without fear of retaliation from opposing counsel through assessment of attorney's fees.

6. Finally, petitioner should not be punished simply because he has not been successful in his case. A frivolous appeal, properly so called, is one so manifestly untenable on a bare inspection of the record and issues presented that its character may be determined "without argument or research." Id., quoting Treat v. State ex rel. Mitten, 121 Fla. 509, 510-11, 163 So. 883, 883-84 (1935). By its own admission, respondent has obstensibly researched the issue the lack of which it now claims attorney's fees for.

Respondent cannot have it both ways. If the issue presented by petitioner's motion was so far-fetched as to be untenable, then it could have simply not responded to it and it would fall of its own insufficeicency. Indeed, this fact shows that respondent's motion has no merit. The intent of the statute is to prevent frivolous lawsuits to which a party is required to respond at his peril, or a meritless appeal taken for the purposes of delay, to which an appellee is likewise obligated to respond. In fact, a literal interpretation of the statute would hold it applicable to a "civil action", not to a motion an adversary finds objectionable. As pointed out in the reply previously filed by petitioner, there is no intimation of what purpose is to be served by filing the motion here complained of if not for a good faith belief in its merit by petitioner.

In conclusion, petitioner cannot overemphasize the serious nature of the charges made by respondent in its motion. He is accused of ignorance of the law, an uncaring attitude for the uses to which the courts are put and abuse of the right to proceed as an indigent. In the course of its advocacy, respondent has lost sight of the proper functioning of the judiciary when considered as a whole, as opposed to the mechanical application of procedures. The thrust of petitioner's motion was to have this case heard on the merits, whether the decision thereon was favorable or not. He should not be punished for the belief that this Court might grant him such a right.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served by mail this 17th day of July, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

IN THE DISTRIC' COURT OF APPEAL OF THE F"TE OF FLORIDA
FIFTH DISTRICT

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

RECEIVED
JUL 26 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

DATE: July 25, 1985

BY ORDER OF THE COURT:

Petitioner's July 17, 1985, Response To Order To Show Cause having been noted, it is

ORDERED that Respondent's MOTION FOR ATTORNEYS' FEES, filed July 9, 1985, is granted. Accordingly, pursuant to Florida Rule of Appellate Procedure 9.400(b) attorney's fees in the amount of $100.00 are hereby assessed against the Petitioner for this appellate proceeding for which let execution lie.

I hereby certify the foregoing is
(a true copy of) the original court order.
Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

By: _____
Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach
Bret Clark, Esq.

A-25

IN THE FIFTH DISTRICT COURT
OF APPEAL, STATE OF FLORIDA

Case No. 85-237

BRET CLARK,

Petitioner,

v. MOTION TO REVIEW ORDER GRANTING ATTORNEY'S FEES

STATE OF FLORIDA,

Respondent.

Petitioner, in proper person, and pursuant to Florida Rule of Appellate Procedure 9.400(c), moves this Court for review of its order granting Respondent's Motion for Attorney's fees entered July 25, 1985. In support thereof is the following:

1. Respondent moved for attorney's fees, under Florida Statute Section 57.105, relying upon a personal attack upon the credibility of Petitioner, urging the Court to "review the correspondence and pleadings in this cause" so that the Court could punish Petitioner for filing "whatever he wants whenever he wants without the slightest regard for the law or judicial resources." Needless to say, this hardly constitutes a legal argument that the issues presented by Petitioner were so lacking in merit that the Court should assess attorney's fees.

2. Apparently the Respondent was referring to correspondence between Petitioner and the Clerk of the Court culminating in a letter from the Clerk dated June 17, 1985, a copy of which is attached hereto, in which Petitioner was invited to pursue his complaints as to the handling of his case "by submitting a proper pleading to the Court." In response to this invitation Petitioner filed the motion for which he was assessed attorney's fees.

3. The substance of the correspondence between the Petitioner and the Clerk of this Court was a complaint by the undersigned that he had not been treated fairly by the Court in the disposition of these

A-26

proceedings. ...eed, the basis for the Mot' for Reh... ng filed by Petitioner was a specific criticism of this Court, in that it had violated the Rules of Appellate Procedure by ruling on the Petition filed herein before the undersigned had an opportunity to file his reply to the response filed by the State in accordance with Rule 9.100(i).

4. Petitioner respectfully argues that the assessment of attorney's fees against him was not predicated on an absence of any justicable issue of law or fact, but, rather, fees were assessed in retaliation for his criticisms of the Court and his attempts to seek redress for these grievances by writing letters and filing papers."(1)

5. Fundamental to a schene of ordered liberty is the notion that an individual has the right to petition the government for redress of his grievances, a right guaranteed by the First Amendment to the United States Constitution, as applied to the State of Florida through the Due Process Clause of the Fourteenth Amendment. Since this Court, as an entity organized under the laws of this State as a part thereof, and as an entity duty bound to enforce the Constitution of the United States, has entered an order which deprives Petitioner of the right to petition the government for redress of grievances and the Due Process of law through its assessment of attorney's fees, Petitioner respectfully argues that Florida Statute Section 57.105 is invalid as being repugnant to the Constitution and laws of the United States of America.

WHEREFORE, and in consideration of the foregoing, Petitioner prays that the Court grant the within Motion to Review the Order Granting Attorney's Fees, vacate its earlier order granting fees, and/or certify the issues raised to be of great public importance.

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 21st day of August, 1985, upon Ellen Phillips, Assistant Attorney General, 125 N. Ridgewood Ave., 4th Floor, Daytona Beach, FL 32014.

Respectfully submitted,

Bret Clark, Esquire
Proceeding Pro Se
7630 Biscayne Blvd.
Suite 202
Miami, FL 33138
(305) 759-2001

A-27

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

(1) Phillips

BRET CLARK

Petitioner,

v. CASE NO. 85-237

STATE OF FLORIDA

Respondent.

DATE: September 12, 1985

BY ORDER OF THE COURT:

ORDERED that Petitioner's MOTION TO REVIEW ORDER GRANTING ATTORNEY'S FEES, filed August 23, 1985, is denied.

RECEIVED
SEP 18 1985
ATTORNEY GENERAL
DAYTONA BEACH, FLA

I hereby certify the foregoing is
(a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK
By: Deputy Clerk

(COURT SEAL)

cc: Attorney General's Office, Daytona Beach
Bret Clark, Esq.

A-28

No. 85 - 6004

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BRET CLARK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

APPEAL FROM AN ORDER OF THE FIFTH DISTRICT
COURT OF APPEAL, STATE OF FLORIDA

BRET SHAWN CLARK, ESQUIRE
Appellant
Suite 500
Miami National Bank Building
8101 Biscayne Boulevard
Miami, Florida 33138
(305) 759-2001

TABLE OF CONTENTS

TABLE OF CITATIONS

On or about December 9, 1985, appellee received the jurisdictional statement filed herein by appellant. On February 28, 1986, the Court wrote to appellee asking that it file a response in accordance with Rule 16 prior to March 31. Rule 16.1 requires that this response be filed within thirty days of receipt of the jurisdictional statement. Appellee then filed a Motion to Dismiss, serving this document on March 25, 1986, on the grounds that appellant did not adequately or properly raise the constitutional issue, concluding that it was therefore not passed upon by the lower court, and that no federal question is raised because, according to appellee, the lower court based the order under review on a rule of court and not the statute under attack.

In support of its motion, the State of Florida relies upon distortions, if not misrepresentations of the record below, as well as a continuation of the ad hominem denunciation of the appellant that resulted in the order here on review. Appellee concludes by stating that appellant is habitually tardy with filings in the state court and has not complied with state procedural rules, without making a cogent argument as to how, if true, these statements relate to the specific grounds for dismissing this appeal relied upon by appellee. Indeed, appellee's motion is itself 2 1/2 months late, and demonstrates an abject lack of comprehension of the Florida Rules of Appellate Procedure. Accordingly, the motion should be denied, and the cause allowed to proceed:

I. THE TRUE POSTURE OF THE CASE

Appellee begins its motion by describing a lax litigant who failed to present pleadings in a timely fashion. The truth of the matter is, appellant is the victim of a state court system which, confronted by a critical and recalcitrant defendant, decided to punish him for attempting to assert his right to a day in court on an appeal from a conviction in a presumably routine traffic case.

The case originally began in August of 1982 when appellant was cited for a traffic violation. Appellee's appendix at A - 3. Two years after his conviction, the appellate division of the local court that originally heard the case sent a one word order of affirmance to appellant's old address. Id. When the order was returned undelivered, the lower appellate court clerk sent

a notice that appellant's license would soon be suspended if he did not remit payment for his affirmed fine to the address from which the earlier order had been returned, knowing that appellant would not receive it. Appellee's appendix at A - 2. This was done in violation of Florida law, and, appellant would argue, without due process of law.

Because appellant did not receive notice of these events, his license was suspended, and he was deprived of his right to appellate review of the affirmance of his conviction. Contrary to the assertions of appellee, appellant is not stupid. He was well aware that his petition to review the affirmance had to be filed within thirty days of the order to be reviewed. In fact, appellant devoted a substantial amount of the petition to this issue, arguing that the 5th District Court of Appeal could take jurisdiction under the theory that appellate review could be had in such a case where an injustice would be averted. Appellee's appendix at A - 2 to A - 3. That court, as conceded by appellee, issued its Order to Show Cause why the Petition should not be granted. Under Florida Rule of Appellate Procedure 9.100(f), this order could not be entered unless the petition, which appellee now apparently argues was frivolous, demonstrated a preliminary basis for relief.

After the State filed its response, the court below dismissed the cause for lack of jurisdiction, and appellant filed for rehearing, complaining that the lower court violated its own rules by ruling prematurely. Appellee's appendix at A - 13 and A - 14. Rather than ruling on this motion, the 5th District Court of Appeal struck the motion as untimely because appellant was not entitled to extra days normally granted when documents are served by mail. When appellant complained to the Clerk of the court, he was invited to file a motion, which he did, asking the court to set aside its order on its own motion. Appellee's appendix at A - 15.

On July 9, 1985, the State responded to this motion, combining with its response a motion for fees under Florida Statute Section 57.105. Appellee's appendix at A - 16 and A - 17. Appellant's reply thereto dealt, for the most part, with the request for reconsideration of the court's order. Appellee's appendix at A - 19 through A - 21. On July 12, 1985, the 5th District Court of Appeal issued an order denying appellant's motion, apparently prior to receiving his response, and ordering appellant to show cause why the motion

for fees filed by appellee should not be granted. Appellee's appendix at A - 18. This order was sent to appellant return receipt requested.

As set forth more fully in appellant's response thereto, such a fee motion must meet a heavy burden to prevail, lest litigants be chilled from exercising their right to access to the courts. Appellee's appendix at A - 22 through A - 24. Because of this, the bulk of appellant's response was devoted to showing that the statute was not applicable, as opposed to arguing it is unconstitutional. Appellant then concluded by stating that he should not be punished for seeking his day in court, with the full expectation that the court below had absolutely no basis to award fees to appellee under Section 57.105. Id. at A - 24.

On July 25, 1985, the court below issued the order granting appellee $100.00 in fees. Id. at A - 25. Although the State would have the Court believe that this award was compensatory, the amount indicates otherwise. Indeed, appellant suggests that the amount was assessed in relation to appellant's argument on the merits, never reached by the court, that his original fine of $50.00 was improperly doubled by the trial court. The court below, in effect, doubled appellant's fine again. Thus, it was not until this order was entered that appellant could anticipate that the lower court would assess a punitive attorney's fees, which appellee even now argues was compensatory, not punitive, in retaliation for his criticism of the court's handling of his case.

Appellant then filed a proper motion to review this order, specifically charging the lower court with retaliation in violation of the United States Constitution. Id. at A - 26 and A - 27. Contrary to the representation of the State, the motion in its entirety is devoted to this issue, and it was not added as an "afterthought." In addition, the lower court denied this motion on the merits, not, as suggested by appellee, because it was procedurally improper. Id. at A - 28.

II. COUNTERARGUMENT

Appellee's arguments in support of its motion are flawed because of its errors in interpreting the rules of this Court as well as those of the lower court. A review of the record must lead the Court to conclude that the within appeal has been properly brought before the Court and that it involves an issue

that not only presents a substantial federal question, but one which is of critical importance to the proper functioning of the courts of this country.

As the above recital of the proceedings below should indicate, this issue narrowly focuses on the manner by which appellant was mistreated by the appellate court, not the substance of that appeal, as the 5th District Court of Appeal dismissed the cause for want of jurisdiction, which itself indicates the impropriety of the order issued, since the court had no authority to enter such an order. Nonetheless, this Court may be of the opinion that the result of this order calls into play the maxim de minimis non curat.

Appellant has been made to suffer, however, in ways that may not readily appear from the record. If left to stand, the order entered by the lower court will serve to demean appellant personally and professionally, particularly in light of the scurrilous allegations upon which it was based, now a matter of public record. In addition, appellant has been unable to obtain a driver's license during the pendency of the appeal below, forcing him to rely on public transportation, and is subject to arrest if placed in the position of having to drive with a suspended license.

Thus, despite the State's apparent predilection to belittle these matters, the effect of the order here appealed is substantial, as is the legal issue presented. But before the question of the substantiality of the federal question presented, and whether it was properly raised, are treated, certain questions not raised by appellee should be explored:

(A) Preliminary Considerations

In requesting the appellee to respond to the jurisdictional statement, this Court may have had reservations as to the potential that appellant could have sought review in the Florida Supreme Court. This issue was not raised by the State. This Court held in Nash v. Florida Industrial Commission, 389 U.S. 235, 88 S. Ct. 362, 19 L Ed 2d 438 (1967) that where, as here, a decision of an intermediate appellate court is not reviewable by a higher court, an appeal would lie. Appellant even went so far as to obtain a letter from the Supreme Court of Florida stating that the order here on review could not be heard by that court. Appellant's appendix at A - 18.

This point is of special significance here, because the State is obstensibly arguing to the Court that the lower court never passed upon the issue whether Florida Statute Section 57.105 is unconstitutional. A District Court of Appeal in Florida may insulate its rulings from further appellate review (except in this Court) by simply neglecting to "expressly" articulate the basis for its decision. see, Fla.R.App.P. 9.030(a)(2)(A)(i) - (iv). Because the sole issue raised by appellant in his motion to review the fee award was the issue here presented, the lower court order on appeal was determinative of this issue, and was passed upon by the 5th District Court of Appeal.

(B) The Federal Question is Properly before the Court

The State urges dismissal of this appeal on the grounds that the statute here at issue is "wholly inapplicable" to the case because the court relied on a rule of procedure to assess fees, and because, in its view, the proper method of contesting an award of fees is not via the provisions of Fla.R.App.P. 9.400, but by way of a motion for rehearing. Aside from the fact that this strained interpretation of the appellate rules is contrary to their plain meaning, it necessarily entails a radical departure from the long-standing law in Florida with respect to attorney's fees.

Appellee devotes substantial space in its motion describing situations where an appellate court grants the right to fees, remanding to the lower court to assess the amount. No effort is made to fit these facts to the case at bar. Appellant readily concedes that this is the preferred method of assessing fees on the appellate level. see, Thornton v. Thornton, 433 So.2d 682, rev. den. 443 So.2d 980 (5th DCA 1983). That the lower court declined to follow the usual method in the case of appellant, together with the fact that the appellate court assessed an amount for fees without reference to any supporting documentation as to the time spent by the appellee's counsel, is further evidence that assessment of fees was purely punitive, not compensatory.

Rule 9.400 governs the procedure by which the appellate courts of Florida grant fees, sub-part (c) of which mandates that a party seek review of orders entered pursuant to the rule by way of motion. This is the practice

in the State of Florida, and appellant followed this procedure properly. Appellee's wooden misaplication of the rules stems from its seizing upon the lower court's mere reference to the rule in its order. The rule itself did not, and could not, form the legal foundation of the award of fees.

In the committee notes to the rule, the draftsmen make clear that a motion for fees must be accompanied by a legal basis therefore, and the rule is "not intended to give a right to assessment of attorney's fees unless otherwise permitted by substantive law." This reflects the well established "American Rule" that each party must bear the cost of their attorney's fees, unless otherwise provided by statute, contract, or where a fund is created. Estate of Hampton v. Fairchild-Florida Construction Company, 341 So.2d 759, 761 (Fla. 1976) citing Kittel v. Kittel, 210 So.2d 1, 3 (Fla. 1976). Thus, the State's interpretation of the order on review would ascribe to it a far-reaching meaning that clearly was not intended. The only plausible interpretation is what happened: the State filed a motion for fees under Section 57.105 and the court granted it.

In addition, appellant raised the unconstitutionality of this statute at the appropriate time, and vigorously contested its applicability from the moment it was raised. The limiting construction imposed on the statute by the courts of Florida clearly remove appellant's case from its reach. It would be unreasonable to hold appellant to the prescience necessary to anticipate that the appellate court would apply the statute beyond its limits. Therefore, it was not until the court had done so that a challenge to the statute, as applied, could be raised. At that time, the sole ground presented on review of the fee assessment was the invalidity of the statute, and this question was ruled upon necessarily by the court.

Because the lower court so ruled, the State is not entitled to dismissal of this appeal. In order to prevail, the State must show first that the federal question was not timely and properly raised, and, in addition, that it was not decided by the lower court. see, Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979). This question has, undoubtably, been properly brought before this Court, and, accordingly, the State's motion must be denied.

(C) The Question is Substantial

Finally, the State argues that no substantial federal question is presented herein, although it makes no argument in support of this conclusory statement. Presumably, the State relies on the argument that because, in its opinion, the issue was not raised properly below, it does not exist. Such an interpretation would render redundant the requirement in this Court's rule that a substantial federal question be presented, apart from that which mandates that it be properly raised.

To dismiss this appeal on this ground, the appellee must show either that the issue has already been decided, or so untenable as to be termed "frivolous". Appellant has found no case stating that a court may retaliate against a critical litigant by assessing fees in the face of a constitutional assault upon such a practice. To argue that such an issue lacks substance is to engage in a level of haughty arrogance employed by the court below in the issuance of its order.

This Court can certainly take judicial notice of the fact that the courts of this country, both state and federal, are overburdened with litigation. The temptation may exist in such courts to "teach a lesson" to an unsuccessful litigant, particularly when the litigant is so critical of the court that the opposing party directs the court's attention to correspondence complaining to the court in its request for fees. But concern for overcrowded courts and attempts to curtail abuses must be circumspect, or the right to access to them will be chilled, if not destroyed. The statute here at issue can, and has been used in the case at bar to deny access to the courts, and to punish a litigant who dared to call into question the propriety of a court's operation. This, in turn, will allow courts to avoid self-improvment, which will then lead to still more inefficiency and malfunctioning in the courts.

The statute called into question has no element of bad faith on the part of the offending litigant. It can, as shown by the facts herein, be applied by a court in retaliation for critical statements by the litigant. It's constitutionality is unquestionably a substantial question. Appellee's motion should therefore be denied.

III. CONCLUSION

The Court ordered that the appellee file a response to the within appeal after the time for this response was past due. Appellant has attempted to anticipate any reservations the Court may have as to the propriety of this appeal, in addition to refuting the mistatements of the record and the arguments presented by the State in support of its motion.

Appellee has understandably sought to characterize the action of the lower court in assessing fees as compensatory, not punitive. But the facts belie this conclusion. The court assessed these fees after holding that it lacked jurisdiction in the case: it assessed these fees without any documentation to support the amount: it re-doubled appellant's fine assessed below, after appellant claimed this was unconstitutional: it granted fees upon a motion relying solely on a personal attack on the appellant and a reference to critical correspondence in the court file: and the amount does not reflect an appropriate sum to compensate an attorney for his or her services; and was assessed directly, contrary to the preferred practice, as enuciated by the very same court.

Appellant has been punished for criticising the lower court, and the statute used for this purpose was misapplied. The fact of its susceptibility to misapplication, and the resulting chilling effect on appellant's rights renders it unconstitutional. This presents a substantial and important federal question, one which was properly and timely raised below, and in any event was passed upon by the lower court. Accordingly, this appeal is properly before the Court, and appellee's motion to dismiss must be denied, or, at the very least, consideration of the Court's jurisdiction postponed until a full briefing on the merits.

Respectfully submitted,

BRET SHAWN CLARK, ESQUIRE

SUPREME COURT OF THE UNITED STATES

BRET CLARK *v.* FLORIDA

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIFTH DISTRICT

No. 85–6004. Decided April 28, 1986

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

CHIEF JUSTICE BURGER.

I agree that we should dismiss this improper appeal, and treating the appeal as a petition for certiorari, deny certiorari. The merits of this appeal are utterly frivolous, as were most of appellant's persistent efforts in the courts of Florida. In light of that frivolousness, as well as appellant's status as a member of the Florida Bar, I would award the State costs and fees under Rule 49.2.

This case originated when appellant Bret Clark received a speeding ticket while traveling on the Florida Turnpike on August 12, 1982. At the time he was a law student. Appellant pleaded not guilty, went to trial *pro se* and lost; he was fined $100. On appeal the Fifth Judicial Circuit Court of Florida, sitting in its appellate capacity, affirmed without opinion on September 4, 1984. At some point during 1984 appellant graduated from law school and was admitted to the Florida Bar.

Five months later, on February 14, 1985, appellant sought a writ of certiorari from the Florida Fifth District Court of Appeal. Under Florida Rule of Appellate Procedure 9.100(c), however, a petition for that writ must be filed within 30 days of the order sought to be reviewed, or in this case, no later than October 4, 1984. Appellant claimed that his petition was nevertheless timely under an exception to the rule when denial of appellate review would be fundamentally unfair, because he claimed he did not become aware of the Fifth Judicial Circuit's order of affirmance until Janu-

ary 14, 1985, after his driver's license had been suspended by the Florida Department of Highway Safety and Motor Vehicles. He apparently failed to inform the Circuit Court of his change of address while appeal was pending and to keep a watchful eye on that court's docket, as he was obligated to do if he intended to pursue his claim.

On the merits, he challenged the arresting officer's failure to show him the digital display on the radar detection device indicating that he was exceeding the speed limit. He also challenged the Florida sentencing procedure as discriminating against traffic offenders who plead not guilty by imposing "double or nothing" fines that exceeded the fine imposed if they pleaded guilty, thereby discouraging offenders from protesting their guilt. Finally, he challenged the constitutionality of the 55 mile per hour speed limit. The Court of Appeal ordered the State to show cause why the petition should not be granted, and the State filed a response raising the jurisdictional bar based on the untimely filing of the petition. On April 15, 1985, the court dismissed the petition for lack of jurisdiction.

Undeterred, appellant filed a motion for rehearing which was stricken as untimely. Over a month later he filed a motion to recall mandate and a suggestion for reconsideration. At this point the State, frustrated with appellant's frivolous litigious efforts, filed a response pointing out that the court had no power to recall mandate, and that no mandate had even issued. The State also moved for attorneys' fees pursuant to Fla. Stat. §57.105 (1985), which provides for an award of fees where a losing party's position is completely lacking any "justiciable issue" of law or fact. The State emphasized that appellant's motion for recall of mandate

> "demonstrates a startling ignorance of the law, and, more importantly, an unwillingness to expend even minimal effort to research facts or law before taking the time of this counsel and this honorable court. . . . [T]he correspondence and pleadings in this cause . . . amply demonstrate petitioner's misconception that his law training entitles him to file whatever he wants whenever he wants without the slightest regard for the law or judicial resources." App. to Juris. Statement A–4.

Appellant responded by citing a Florida District Court of Appeal decision from 1980 supporting his position that the court could consider his rehearing motion. See *Rogers* v. *State Farm Mutual Automobile Insurance Co.*, 390 So. 2d 138 (Fla. App. 1980). He also asserted that the State's motion for fees "demonstrate[d] a shocking degree of arrogance and lack of professionalism," App. to Juris. Statement A–7, and that the State, "by its motion, reveals that it has nothing but contempt for a law student who does not simply permit an injustice to run its course, paying an unjust penalty." *Id.*, at A–8.

The Court of Appeal issued an order to show cause why sanctions should not be awarded, and appellant again responded that his efforts were not frivolous, relying on the same 1980 case. He claimed his driver's "license was suspended without notice or an opportunity to be heard." App. to Juris. Statement A–10. The State filed a notice of supplemental authority pointing out that the 1980 case upon which appellant relied had been *reversed* by the Florida Supreme Court in 1981. See *State Farm Mutual Automobile Insurance Co.* v. *Judges of the District Court of Appeal*, 405 So. 2d 980 (Fla. 1981), *reversing* 390 So. 2d 138 (Fla. App. 1980). The Court of Appeal thereafter denied the motion for recall of mandate and awarded attorneys' fees in the amount of $100 against appellant pursuant to Florida Rule of Appellate Procedure 9.400(b).

Not one to suffer defeat lightly, appellant untimely moved the Court of Appeal to review its order granting the nominal $100 fee award. *For the first time*, as appellant acknowledges, see Juris. Statement 2, he claimed that the award of sanctions was in retaliation for certain correspondence he had sent to the Court of Appeal complaining about the "denial" of

appellate review of his conviction, in violation of his First Amendment right to petition for redress of grievances. He contended that the fee statute was therefore "repugnant to the Constitution and laws of the United States of America." App. to Juris. Statement A–14. The Court of Appeal summarily denied his motion to review the award on September 12, 1985, and the Florida Supreme Court informed appellant that it lacked jurisdiction to review orders granting fee awards under Rule 9.400(c) on November 14, 1985.

From the Florida Fifth District Court of Appeal's "final" order, appellant brings this appeal challenging the fee award as in violation of the First Amendment. He claims Fla. Stat. § 57.105 permits an award of fees based "upon the vague concept of what constitutes a 'justiciable issue.'" Juris. Statement 2. This claim, coming from an attorney, is so utterly frivolous as to not warrant any further discussion. All this suggests is that appellant considers the judicial system a laboratory where small boys can play.

Rule 49.2 provides that "[w]hen an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages." Plainly this is an appropriate case for sanctions. As the State makes clear,

> "This case, although the subject of considerable judicial attention, has been troubled by two common elements—untimeliness and only casual observance of proper state procedural rules. Every pleading Clark filed after the affirmance of his speeding ticket was either late or inappropriate and filed with but a minimal knowledge of relevant procedure. That which started him litigating in the Fifth District Court of Appeal was filed almost four months late. Even after being informed that the court was without jurisdiction to entertain the petition, Clark nevertheless persisted in his efforts to obtain something to which he was not legally entitled under state law. When that persistence resulted in a motion for him to pay for the state's costs in the litigation, he was given an opportunity to show cause why such an assessment should not issue. At most, Clark only offered reasons which had nothing to do with the purpose of the motion." Motion to Dismiss 4–5.

Appellant now claims that he "is the victim of a state court system which, confronted by a critical and recalcitrant defendant, decided to punish him for attempting to assert his right to a day in court on appeal from a conviction in a presumably routine traffic case." Brief Opposing Motion to Dismiss 1. This distorted framing of the issue simply illuminates the frivolousness of this appeal. The extended proceedings in this case make clear that no one has denied Bret Clark his day in court. Rather, appellant has demonstrated a contempt for the Florida courts and the system of justice by repeatedly ignoring filing deadlines and by raising patently frivolous claims. As a result of his protracted efforts to keep this case alive, the State has been denied its right to put an end to this tedious litigation.

This curious sequence suggests the dangers of a system of legal education that trains students in technique without instilling a sense of professional responsibility and ethics—a bit like giving a small boy a loaded pistol without instruction as to when and how it is to be used. Had he thus conducted himself after finishing law school and before being admitted to practice the State would plainly have been entitled to conclude that he was unfit to be a member of the Bar.

I would impose a penalty of $1,000 in favor of the State against appellant, who, as a member of the Florida Bar, has abused his privilege to practice law by repeatedly filing frivolous papers.